

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MOHAMMED BASSAM-AHMED ALAWI	:	DETERMINATION
	:	DTA NO. 819280
for Revision of a Determination or for Refund of Tax on	:	
Cigarettes and Tobacco Products under Article 20 of the	:	
Tax Law for the Period November 1, 1996.	:	

Petitioner, Mohammed Bassam-Ahmed Alawi, 35 East Bihrwood Drive, West Seneca, New York 14224, filed a petition for revision of a determination or for refund of tax on cigarettes and tobacco products under Article 20 of the Tax Law for the period November 1, 1996.

On April 9, 2003, the Division of Taxation, by its representative, Barbara G. Billet, Esq. (Michelle M. Helm, Esq., of counsel), filed a motion for an order granting summary determination to the Division of Taxation pursuant to sections 3000.5 and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal on the ground that petitioner failed to file a request for a conciliation conference with the Bureau of Conciliation and Mediation Services or a petition with the Division of Tax Appeals for an administrative hearing within 90 days of the issuance of a Notice of Determination to petitioner. On April 22, 2003, petitioner, appearing *pro se*, filed a response to the Division of Taxation's motion for summary determination.

Upon the motion papers, the affidavits and documents submitted therewith, petitioner's response and all pleadings and documents submitted in connection with this matter, Brian L. Friedman, Administrative Law Judge, renders the following determination.

ISSUE

Whether summary determination should be granted in favor of the Division of Taxation on the basis that petitioner did not file a request for a conciliation conference with the Bureau of Conciliation and Mediation Services or a petition with the Division of Tax Appeals within 90 days after the issuance of a notice of determination to petitioner.

FINDINGS OF FACT

1. The Division of Taxation ("Division") issued a Notice of Determination, dated July 14, 1997, to Mohammed Bassam-Ahmed Alawi ("petitioner") which was addressed as follows: "MOHAMMED BASSAM-AHMED ALAWI, 8330 LOWER EAST HILL RD., COLDEN, NY 14033-9761." The notice bore assessment identification number L-013877728-3 and assessed a penalty in the amount of \$155,500.00 for the period November 1, 1996.

2. On December 27, 2002, the Division of Tax Appeals received a petition for an administrative hearing which was dated December 20, 2002. The envelope containing the petition bore a United States Postal Service ("USPS") postmark of December 24, 2002. Attached to the petition were various letters between petitioner's former representatives and the Division which were written between February and May 2001 as well as a form DTF-991 (Correspondence Acknowledgment Notice) dated October 7, 2002 and a form DTF-982.52 (Release of Income Execution) dated October 23, 2002. On March 6, 2003, the Division served an Answer to the petition.

3. In support of its motion for summary determination, the Division submitted: an affidavit of its representative, Michelle M. Helm, Esq.; the Division's answer to the petition; affidavits of Geraldine Mahon and Daniel LaFar, employees of the Division; a copy of the notice of determination; a copy of the Division's certified mail record ("CMR") for July 14, 1997; and a copy of petitioner's petition (with attachments) as well as a copy of the envelope in which the petition was sent to the Division of Tax Appeals.

4. Geraldine Mahon is the Principal Clerk of the CARTS (Case and Resource Tracking System) Control Unit of the Division. In her affidavit, Ms. Mahon described the Division's general procedure for processing notices of deficiency and determination prior to shipment to the Division's mechanical unit for mailing.

Ms. Mahon receives a CMR and the corresponding statutory notices generated by CARTS each of which are predated with the anticipated date of mailing. Each notice is assigned a certified control number which is recorded on the CMR under the heading "CERTIFIED NO."

The CMR for the block of statutory notices issued on July 14, 1997, including the notice of determination issued to petitioner, consisted of 24 fan-folded (connected) pages. All pages are connected when the CMR is delivered into the possession of the USPS. The pages remain connected when the CMR is returned to Ms. Mahon's office unless she requests that they be disconnected.

The CMR for the statutory notices mailed via certified mail on July 14, 1997, including the notice issued to petitioner, bears certified control numbers which run consecutively. Each page contains eleven entries, with the exception of the last page (page 24) which contains two entries.

In the upper left hand corner of page 1 of the CMR, the date “07/03/97” was manually changed to “7/14/97.” The original date of 07/03/97 was the date that the entire CMR was printed. The CMR is printed approximately 10 days in advance of the anticipated date of mailing of the particular statutory notices in order to ensure that there is sufficient lead time for the statutory notices to be manually reviewed and processed for postage by the Division’s Mechanical Section. The handwritten change of the date from 07/03/97 to 7/14/97 was made by personnel in the Division’s Mail Processing Center. The change was made to ensure that the date on the CMR conformed with the actual date that the statutory notices and the CMR were delivered into the possession of the USPS.

Each statutory notice is placed in an envelope by Division personnel and the envelopes are then delivered into the possession of a USPS representative who affixes his or her initials or signature and a U.S. postmark to a page or pages of the CMR. In this particular case, the USPS representative affixed a postmark to each page of the CMR, circled “255” on page 24 of the CMR and initialed or signed page 24 of the CMR. Pursuant to the CMR, the total number of statutory notices mailed on July 14, 1997 was 255.

Page 20 of the CMR indicates that a Notice of Determination with notice number L 013877728 was sent to “MOHAMMED BASSAM-AHMED ALAWI, 8330 LOWER EAST HILL RD., COLDEN, NY 14033-9761” by certified mail using control number “P 911 204 915.” A U.S. postmark on each page of the CMR confirms that the Notice of Determination was sent on July 14, 1997.

In the regular course of business and as a common office practice, the Division does not request, demand or retain return receipts from certified or registered mail generated by CARTS.

The procedures followed and described in Ms. Mahon's affidavit were the normal and regular procedures of the CARTS Control Unit on July 14, 1997.

5. Daniel LaFar is a Principal Mail and Supply Clerk in the Division's Mail Processing Center. He is fully familiar with the operations and procedures of the Mail Processing Center and supervises Mail Processing Center staff, including the staff that processes and delivers outgoing mail to the various branches of the USPS.

Statutory notices which are ready for mailing to taxpayers are received by the Mail Processing Center in an area designated "Outgoing Certified Mail." A CMR is also received by the Mail Processing Center for each batch of statutory notices. A member of the staff operates a machine which puts each statutory notice into an envelope, weighs and seals the envelope and places postage and fee amounts on the envelope. A mail processing clerk checks the first and last pieces of certified mail listed on the CMR against the information listed on the CMR.

A member of the staff then delivers the sealed, stamped envelopes to one of the various branch offices of the USPS located in the Albany, New York area. A USPS employee will then affix a postmark and/or his or her initials or signature to the CMR indicating receipt of the mail listed on the CMR and the CMR itself. The USPS has further been requested by the Mail Processing Center to either circle the number of pieces received or indicate the total number of pieces received by writing the number of pieces on the CMR. As a matter of standard procedure and to insure accountability, the CMR may be left overnight at the post office to enable the postal employee to process the certified mail and to make the appropriate notations on the CMR. The CMR is then picked up at the post office on the following day by a member of Mr. Baisley's staff whereupon it is then delivered to the CARTS unit. The CMR retrieved from the USPS is the Division's record of receipt by the USPS for the pieces of certified mail listed thereon.

A USPS employee affixed a postmark to each page of the CMR, initialed or signed page 24 of the CMR and circled the total number of pieces of certified mail received. The last page of the CMR, page 24, indicates that 255 pieces were delivered to the USPS.

Based upon his review of the affidavit of Geraldine Mahon, including the exhibits attached to the affidavit and his personal knowledge of the procedures of the Mail Processing Center, Mr. LaFar attested to the fact that on July 14, 1997, an employee of the Mail Processing Center delivered a piece of certified mail addressed to MOHAMMED BASSAM-AHMED ALAWI, 8330 LOWER EAST HILL RD., COLDEN, NY 14033-9761, to the USPS in Albany, New York in a sealed postpaid windowed envelope for delivery by certified mail. Mr. LaFar further attested to the fact that a member of his staff obtained a copy of the CMR delivered to and accepted by the USPS on July 14, 1997 to be kept as part of the records of the CARTS Control Unit.

The procedures described in Mr. LaFar's affidavit are the regular procedures followed by the Mail Processing Center staff in the ordinary course of business when handling items to be sent by certified mail and such procedures were followed on July 14, 1997.

6. In response to the Division's motion for summary determination, petitioner submitted a letter wherein he denies ever having received the notice which allegedly was sent to him on July 14, 1997. He admits, however, that he lived at 8330 Lower East Hill Road in Colden, New York where he rented a room. He states that he never knew that he had an option to dispute the tax assessment at issue until his wife explained his options to him.

CONCLUSIONS OF LAW

A. A motion for summary determination may be granted:

if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

B. Tax Law § 478 authorizes the Division of Taxation to issue a Notice of Determination to a taxpayer if a return required under Article 20 of the Tax Law is not filed or if a return when filed is incorrect or insufficient. Pursuant to such section, such determination “shall finally and irrevocably fix the tax” unless the person against whom it is assessed files a petition with the Division of Tax Appeals seeking revision of the determination within 90 days of the mailing of the notice. As an alternative to filing a petition with the Division of Tax Appeals, a taxpayer may request a conciliation conference with the Division of Taxation’s Bureau of Conciliation and Mediation Services. The time period for filing such a request is also 90 days (Tax Law § 170[3-a][a]). The filing of a petition or a request for conciliation conference is a prerequisite to the jurisdiction of the Division of Tax Appeals (*Matter of Roland*, Tax Appeals Tribunal, February 22, 1996).

C. Tax Law § 480-a(2)(d) provides that the provisions of Article 28 of the Tax Law relating to the personal liability for the tax, administration, collection and determination of tax shall apply to Article 20 of the Tax Law in the same manner and with the same force and effect as if those provisions of Article 28 had been fully incorporated into Article 20. Tax Law § 1147(a)(1), contained within Article 28, provides that a Notice of Determination shall be mailed by certified or registered mail to the person for whom it is intended “at the address given in the last return filed by him pursuant to [Article 28] or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable.” The mailing of

such notice “shall be presumptive evidence of the receipt of the same by the person to whom addressed.” (*Id.*)

D. When the timeliness of a request for a conciliation conference or a petition is at issue, the Division bears the burden of proving both the date and fact of mailing of the statutory notice (*Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991; *Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). The mailing evidence required of the Division is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of the statutory notice by one with knowledge of the relevant procedures; and, second, there must be proof that the standard procedure was followed in the particular instance in question (*see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra*).

In the present matter, the affidavits of two Division employees, Geraldine Mahon (Principal Clerk of the CARTS Control Unit) and Daniel LaFar (Principal Mail and Supply Clerk in the Division’s Mail Processing Center) provide adequate proof of the Division’s standard procedures for the mailing, by certified mail, of notices of determination. The affidavits generally describe the procedures employed and further attest to the authenticity and accuracy of the copy of the Notice of Determination and the certified mail record submitted as evidence of actual mailing of the notice to petitioner.

Moreover, such affidavits and the certified mail record establish that such procedures were followed with respect to the Notice of Determination issued by the Division on July 14, 1997. Specifically, the 24-page CMR listed certified control numbers with corresponding names and addresses including, on page 20 thereof, petitioner’s certified control number, statutory notice number and his name and address. All 24 pages of the CMR bore a USPS postmark dated July

14, 1997. In addition, the postal employee who received all of the Division's certified mail on July 14, 1997 signed or initialed the last page of the CMR and circled "255" on that page to indicate receipt by the post office of all 255 pieces of mail listed thereon (*cf.*, *Matter of Roland, supra* [where the mailing documents were found to be inadequate because there was no showing of the source of the affiant's knowledge as to the significance of the circling of the number of total pieces of mail listed]). This evidence is sufficient to establish that the Division mailed the subject Notice of Determination to petitioner on July 14, 1997.

E. Petitioner's petition to the Division of Tax Appeals was mailed on December 24, 2002, a date which was approximately five and one-half years after the issuance of the Notice of Determination. The petition was, therefore, untimely filed (*see*, Tax Law § 478).

F. The Division of Taxation's motion for summary determination is granted and the petition of Mohammed Bassam-Ahmed Alawi is hereby dismissed.

DATED: Troy, New York
July 31, 2003

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE